

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE GAMBLING CONTROL BOARD**

In the Matter of the
Lawful Gambling License of
Polk County Humane Society,
License Number 01031

**ORDER ON BOARD'S MOTION
FOR PARTIAL SUMMARY
DISPOSITION**

The above-entitled matter came before Administrative Law Judge Barbara L. Neilson on the Gambling Control Board's Motion for Partial Summary Disposition. The Board filed its motion on March 24, 2003. The Respondent filed its response to the motion on April 7, 2003, and the Board submitted a reply letter brief on April 14, 2003. Oral argument on the motion was heard via telephone on April 29, 2003, and the OAH record closed for purposes of this motion on that date.

E. Joseph Newton, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103-2122, represented the Minnesota Gambling Control Board. Edwin M. Odland, Odland, Fitzgerald, Reynolds & Remick, P.L.L.P., Attorneys at Law, P.O. Box 457, Crookston, Minnesota 56716, represented the Polk County Humane Society ("Respondent").

Based upon the file, record, and proceedings herein, and for the reasons set forth in the accompanying Memoranda, the Administrative Law Judge makes the following:

ORDER

1. The Gambling Control Board's Motion for Summary Disposition is GRANTED as to Counts III, IV, V, VII, VIII, IX and X.
2. The Gambling Control Board's Motion for Summary Disposition is DENIED as to Count XI.
3. Pursuant to the modified Scheduling Order of March 10, 2003, the hearing on the remaining allegations will take place on June 16, 2003. A telephone conference call will be held at 9:30 a.m. on Monday, June 2, 2003, to discuss the location of the hearing. The Administrative Law Judge will initiate the conference call.

Dated: May 28, 2003.

/s/ Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

Underlying Facts

Polk County Humane Society (“Respondent”) is licensed by the Gambling Control Board to conduct lawful gambling. The Board issues lawful gambling licenses and premises permits and is empowered to revoke or suspend licenses and premises permits, censure licensees, and/or assess civil penalties for violations of relevant laws and rules.¹ At all times relevant to this proceeding, the Respondent has held a premises permit and conducted lawful gambling (pull-tab games and bingo) at the premises known as I.C. Muggs, Captain Crook’s, and Swede’s Snowsled Inn located in Crookston, Minnesota.

On or about March 12, 2002, a lawful gambling specialist conducted a compliance review of the Respondent’s gambling operations. The specialist prepared a report alleging several violations by the Respondent, including the following: (1) failing to present the monthly report containing all information of its gambling activities to its members; (2) failing to maintain accurate physical and perpetual inventory systems and failure to reconcile the records on a monthly basis; (3) failing to reconcile its profit carryover with its cash balance on hand; (4) failing to accurately complete Schedule F forms required by the Board; (5) failing to maintain records that account for its assets, liabilities, and fund balance; (6) filing false and inaccurate information with the Department of Revenue and the Board by failing to accurately report expenditures from the gambling account and expenses paid from its general account; (7) failing to accurately report its pull-tab games; (8) failing to correctly complete prize receipt forms for winning pull-tabs; (9) failing to post or maintain all required information at its gambling premises; (10) using non-gambling funds to directly supplement rent above the statutory and regulatory limits; and (11) allowing its former gambling manager and employees to participate as players in the conduct of lawful gambling on leased premises.²

On August 13, 2002, the Board mailed a preconference memorandum to the Respondent detailing these allegations. On August 20, 2002, the Respondent met with the Board’s Compliance Review Group, a committee authorized to conduct hearings, negotiate consent orders, and recommend disciplinary action to resolve licensing violations.³ On November 18, 2002, the Board served and filed a Notice of and Order for Prehearing Conference and a Request for an Administrative Law Judge Assignment. On January 10, 2003, the Board served its First Request for Admissions on the Respondent. The Respondent responded to the Board’s Request for Admissions on or about January 31, 2003. Based on the Respondent’s admissions, the Board has moved for partial summary disposition on eight of its fourteen allegations (Counts III, IV, V, VII, VIII, IX, X and XI).

Scope and Standard of Review

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material

¹ Minn. Stat. §§ 349.151, subd. 4, and 349.155, subd. 4 (2000).

² See Notice of and Order for Hearing.

³ Minn. R. 7865.0010, subp. 2.

fact and one party is entitled to judgment as a matter of law.⁴ The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.⁵

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.⁶ To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.⁷ A nonmoving party cannot rely on pleadings alone to defeat a summary judgment motion.⁸ The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05.⁹

When considering a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party,¹⁰ and all doubts and factual inferences must be resolved against the moving party.¹¹ If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.¹²

Allegations and Contentions of the Parties

Count III – Incomplete Inventory Reports

Minn. Stat. § 349.19, subd. 9a, requires organizations licensed under Chapter 349 to maintain records that account for the assets, liabilities, and fund balance of the organization. The rules issued by the Board under this statute require licensed organizations to submit monthly reports on their physical inventory of pull-tabs and other games using a "LG846" form.¹³ The Board requires the physical inventory record to include specific information including part number, date, and signature. The Board uses these records to track pull-tab games to ensure that they are not improperly sold, stolen or lost. The Board alleges in this count that Respondent has failed to accurately report

4 Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1995); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. Rules, 1400.5500K; Minn.R.Civ.P. 56.03.

5 See Minn. Rules 1400.6600 (2002).

6 Illinois Farmers Insurance Co. v. Tapemark Co., 273 N.W.2d 630, 634 (Minn. 1978); Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W.2d 804, 808 (Minn. App. 1984).

7 Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986).

8 White v. Minnesota Dept. of Natural Resources, 567 N.W.2d 724 (Minn. App. 1997).

9 *Id.*; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988).

10 Ostendorf v. Kenyon, 347 N.W.2d 834 (Minn. App. 1984).

11 See, e.g., Celotex, 477 U.S. at 325; Thompson v. Campbell, 845 F.Supp. 665, 672 (D.Minn. 1994); Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Greaton v. Enich, 185 N.W.2d 876, 878 (Minn. 1971).

12 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-251 (1986).

13 See Minn. Rule 7861.0120, subp. 3 (2001) (all inventory records must be recorded on forms prescribed by the Board).

month-end physical inventory records on LG846 forms in violation of Minn. Stat. § 349.19, subd. 9a.

The Respondent has admitted that its physical inventory reports have not always included the required part number, date, and signature of the person completing the report.¹⁴ The Respondent points out, however, that it has appropriately completed the LG846 form on a monthly basis since August 31, 2002.

Count IV – Profit Carryover Variance

Minn. Stat. § 349.19, subd. 5 requires a licensed organization to report to the Department of Revenue and to its membership monthly on its gross receipts, expenses, profits, and expenditure of profits from lawful gambling. The report must include a reconciliation of the organization's profit carryover with its cash balance on hand. Profit carryover is an organization's cumulative net profit less cumulative lawful purpose expenditures.¹⁵ An organization's profit carryover should equal the total amount of cash in its gambling bank account. Any difference between the reported profit and the amount in its gambling bank accounts is referred to as a "profit carryover variance."¹⁶ The Respondent's reported profit carryover for January 2002 did not match the profit carryover amount computed by the Department of Revenue for January 2002. Consequently, the Board argues that the Respondent failed to reconcile its profit carryover with its cash balance in violation of Minn. Stat. § 349.19, subd. 5. The Board contends that the Respondent reported a profit carryover of \$21,591.34 for January 2002 while the Department of Revenue showed the Respondent's profit carryover to be \$16,598.86.

Respondent admits that its reported profit carryover (Line 44 of its Activity Summary and Tax Return) for January 2002 did not match the profit carryover amount computed by the Minnesota Department of Revenue for that month.¹⁷ Respondent denies, however, that it reported a profit carryover of \$21,591.34 for January 2002 as claimed by the Board. Instead, Respondent asserts that it originally reported a profit carryover of \$18,605.02 for January 2002. Respondent reduced this figure to \$17,121.58 when it submitted an amended Activity Summary and Tax Return on July 25, 2002.

Count V – Inaccurate Cash Reporting

Minn. Stat. § 349.19, subd. 9a, requires organizations licensed under this chapter to maintain records that account for the assets, liabilities, and fund balance of the organization. Minn. Stat. § 349.19, subd. 5, requires licensed organizations to report their gross receipts, expenses, profits, and expenditures from lawful gambling and to reconcile their profit carryover with their cash balance on hand. Pursuant to these recordkeeping statutes, the Board requires licensed organizations to submit Schedule F

¹⁴ Respondent Admission No. 12.

¹⁵ Minn. Stat. § 349.12, subd. 30a.

¹⁶ *In re the Lawful Gambling License of Hibbing VFW Post 8510*, 529 N.W.2d 476, 477-78 (Minn. App. 1995).

¹⁷ Respondent Admissions No. 13-15.

forms to account for their assets, liabilities, and fund balances.¹⁸ The Board contends in Count V that, by reporting that it had more money than it actually had on hand, Respondent failed to accurately complete Schedule F forms in violation of Minn. Stat. § 349.19, subds. 5 and 9a.

The Respondent admits that it entered \$4,297.30 on Line 6 of a Schedule F form as its starting cash for January 2002.¹⁹ The Respondent further admits that it actually had only \$3,900.00 on hand in starting cash for January 2002.²⁰

Count VII – False Reports

Minn. Stat. § 349.19, subd. 2, requires licensed organizations to maintain all proceeds from lawful gambling in a separate gambling account. All expenditures related to gambling activities must be made from this separate gambling account. The Board contends that the Respondent violated Minn. Stat. § 349.19, subd. 2, by using non-gambling funds to pay gambling expenditures and by placing gambling proceeds in an account other than its separate gambling account. By making these payments and by failing to accurately report them, the Board also maintains that the Respondent violated Minn. Stat. § 349.155, subd. 4(3), and 349.19 subd. 5, which require the Respondent to report to the Department of Revenue on its gross receipts, expenses, profits, and expenditures from lawful gambling.

The Respondent admits that it paid gambling expenses from its general account.²¹ The Respondent further admits that it made lawful purpose expenditures to its general account to pay for allowable expenses related to its lawful gambling.²² And the Respondent admits that it failed to accurately report these expenditures from its gambling bank account.²³

Count VIII – Commingling Funds

Minn. Stat. § 349.19, subd. 9a, and Minnesota Rules 7861.0080, subps. 6D and 6E, require licensed organizations to complete detailed monthly reports on their pull-tab games, which include reporting on actual gross receipts, actual prizes, net receipts, and the actual cash profit or loss from each deal of pull-tabs. In Count VIII, the Board contends that the Respondent commingled funds from one pull-tab game to another or added non-gambling funds to a closed pull-tab game to reduce a cash shortage in violation of the accurate reporting requirements of Minn. Stat. § 349.19, subd. 9a, and Minnesota Rules 7861.0080, subps. 6D and 6E.

The Respondent admits that it combined other funds upon closing pull-tab games to reduce cash shortages for those games.²⁴

¹⁸ See, Minn. Rule 7861.0120, subp. 3 (2001).

¹⁹ Respondent Admission No. 16.

²⁰ Respondent Admission No. 17.

²¹ Respondent Admission No. 21.

²² Respondent Admission No. 22.

²³ Respondent Admission No. 23.

²⁴ Respondent Admission No. 24.

Count IX – Incomplete Prize Receipts

Minn. Stat. § 349.19, subd. 10, and Minnesota Rule 7861.0080, subp. 6C, require licensed organizations to collect fully completed prize receipt forms for winning pull-tabs. These forms are required to include, among other things, the signature of the person redeeming the pull-tab, the driver's license number, and the form of identification provided by the winner. The Board contends in Count IX that Respondent failed to collect fully-completed prize receipt forms for its winning pull-tab games.

Respondent admits that its prize receipts did not contain the driver's license number of the winner.²⁵ The Respondent also admits that its prize receipts did not contain the form of identification provided by the winner or the signature of the seller redeeming the ticket.²⁶ The Respondent points out, however, that while its operators made some mistakes, the majority of its redeemed prize receipts contained all the required information.

Count X – Failure to Post

Minn. Rule 7861.0060, subps. 1D(2) and 4E, require licensed organizations to post and maintain certain information at its leased premises. The required information includes, among other things, a sketch of the leased premises and a statement on a prescribed form that illegal gambling is prohibited. The Board contends in Count X that Respondent failed to post and maintain the required information.

The Respondent admits that it did not post a statement in its house rules regarding illegal gambling being prohibited.²⁷ Instead, the Respondent posted an older pre-printed version of gambling house rules that did not contain the required statement "illegal gambling is prohibited." The Respondent maintains that it corrected this error after the Board pointed it out on March 12, 2002. The Respondent further admits that it did not maintain a sketch of the leased area at each gambling site.²⁸ The Respondent states that it corrected this problem after the Board pointed it out on March 12, 2002.

Count XI – Supplementation of Rent

Minnesota Rule 7861.0060, subp. 2D(3), prohibits a licensed organization from using nongambling funds to directly or indirectly supplement rent above the amounts specified in the rule. Under Minnesota Rule 7861.0060, subpart 2D(1), the amount of rent an organization may pay may not exceed \$1,000 per month for all forms of lawful gambling other than bingo. In Count XI of the Notice of Prehearing Conference, the Board alleges that Respondent violated this rule by using non-gambling funds to directly supplement rent at Captain Crooks above the statutory and regulatory limits. The Board contends that Respondent paid Captain Crooks additional sums from its general account to supplement the rent. In its memorandum in support of its summary disposition motion, the Board asserted "Respondent brazenly admits to using non-gambling funds to directly supplement rent above the statutory and regulatory limits in

²⁵ Respondent Admission No. 25.

²⁶ Respondent Admission Nos. 26-27.

²⁷ Respondent Admission No. 28.

²⁸ Respondent Admission No. 29.

violation of Minn. R. 7861.0060, subp. 2D(3).²⁹ In its response to the Board's initial motion, Respondent admitted that it wrote five separate checks of \$400 each from its general non-gambling account to Captain Crooks or its principals between May and October 1999.³⁰ The Respondent further conceded that the checks were written to "supplement the rent, due to the fact that the bar owner wanted a rental increase."³¹ The Respondent contends, however, that the amounts at issue did not exceed the statutory and regulatory rent limitation of \$1,000 a month.³² In its reply letter, the Board raised a new argument alleging that, by paying supplemental rent from its non-gambling account, Respondent violated Minn. Stat. § 349.19, subd. 2, which requires licensed organizations to pay gambling-related items from a separate gambling bank account.

Neither party has identified what the monthly rent at Captain Crooks was for the time period at issue.³³ However, counsel for the Board stated at the oral argument that the Board was no longer alleging that Respondent supplemented its rent above the statutory and regulatory limitations, and said that the Board instead is alleging that Respondent violated Minn. Stat. § 349.19, subd. 2, by paying rent with funds from its general account instead of its gambling bank account.

Analysis

The Board argues that, based on Respondent's admissions and the governing statutes and rules, there are no facts in dispute with respect to the above-listed allegations and that it is entitled to summary disposition as a matter of law. The Respondent contends that, despite its admissions, important factual issues remain regarding when the violations occurred and what corrective action Respondent has taken, which make granting summary disposition inappropriate.

The ALJ concludes that there are no issues of material fact with respect to the allegations outlined in counts III, IV, V, VII, VIII, IX and X and the Board is entitled to summary disposition on these as a matter of law. Specifically, Respondent's admissions establish that Respondent failed to accurately report month-end physical inventory information in violation of Minn. Stat. § 349.19, subd. 9a (Count III); Respondent failed to reconcile its profit carryover with its cash balance in violation of Minn. Stat. § 349.19, subd. 5 (Count IV); Respondent failed to accurately report its cash balance on hand for January 2002 in violation of Minn. Stat. § 349.19, subds. 5 and 9a (Count V); Respondent commingled funds from its gambling and general bank accounts and failed to accurately report expenditures from its gambling bank account in violation of Minn. Stat. § 349.19, subds. 2 and 5 (Count VII); Respondent commingled funds from one pull-tab game to another or added non-gambling funds to a closed pull-tab game to reduce cash shortages in violation of Minn. Stat. § 349.19, subd. 9a (Count VIII); Respondent submitted incomplete prize receipts in violation of Minn. Stat. § 349.19, subd. 10, and Minn. Rule 7861.0080, subp. 6C (Count IX); and Respondent failed to maintain and post required information at its leased premises in violation of Minn. Rule

29 Board's memorandum in support of summary disposition at 8.

30 Respondent Admission No. 30 and Answer to Interrogatories No. 30-31.

31 Respondent Answer to Interrogatory No. 31.

32 Respondent Admission No. 30.

33 Based on submissions from the parties, it appears that in 2002 the monthly rent at Captain Crooks was \$600.

7861.0060, subp. 1D(2) and subp. 4E (Count X).³⁴ These violations are grounds for disciplinary action pursuant to Minn. Stat. § 349.155, subd. 4.

The Administrative Law Judge finds, however, that it would not be appropriate to enter summary disposition as to Count XI. In its Notice of Prehearing Conference, the Board merely alleged in Count XI that Respondent violated Minn. Rule 7861.0060, subp. 2D(3), by using nongambling funds to supplement the rent over the \$1,000 limit. The Board has now abandoned this argument and is instead alleging that the Respondent violated Minn. Stat. § 349.19, subd. 2, by paying gambling-related expenses from its general account. It would not be proper to reach a determination concerning this issue at this time because the Board raised this allegation for the first time in its reply letter and oral argument. If the Board wishes to pursue this new allegation, it should amend its Notice of Prehearing Conference accordingly. Because the Board no longer asserts that Respondent violated Minn. Rule 7861.0060, subp. 2D(3), as originally alleged in Count XI, the Board's motion for summary disposition on Count XI is denied.

In conclusion, the Board's motion for partial summary disposition is granted with respect to Counts III, IV, V, VII, VIII, IX and X, and denied with respect to Count XI. It is recommended that the Board take disciplinary action against Polk County Humane Society's lawful gambling license based on these violations. The Respondent will have the opportunity to present argument to the Board regarding corrective measures it has taken and any other mitigating circumstances it wishes to raise once the ALJ's final recommended decision has been issued. This matter is set on for hearing on June 16, 2003 on the remaining allegations. The location of the hearing will be discussed during a conference call on June 2, 2003.

B.L.N.

³⁴ Although the Board did not cite all of the statutory subdivisions and rule subparts set forth above in its Notice of Prehearing Conference, the overall statutory and rule provisions were specified in the Notice, the Notice and the Board's motion referred to the specific allegations in detail, and the motion papers filed by the Board contained more specific references to the particular subdivisions and subparts of the statutes and rules involved. The Humane Society responded to the Board's allegations and did not argue that it lacked adequate notice of the issues raised by the Board. Under these circumstances, it is concluded that the Humane Society had adequate notice of and opportunity to respond to the Board's specific allegations. See, e.g., *In re Eller Media Co.'s Applications for Outdoor Advertising Device Permits*, 642 N.W.2d 492 (Minn. App. 2002) (even though DOT did not inform sign company of the specific grounds for the denial of its permit applications, due process rights to adequate notice were not prejudiced where the issue was addressed at hearing, the company had the opportunity to present testimony and evidence on the issue, and the issue was argued in the company's post-hearing brief); *Rosen v. Board of Med. Examiners*, 539 N.W.2d 345, 348 (Iowa 1995) (decision of medical licensing board was upheld where amended notice of hearing "merely enlarged the factual basis supporting the charge"); G. Beck et al, *Minnesota Administrative Procedure* (2d ed. 2001) at 63 ("[a]mendments made during the hearing generally do not raise due process notice problems as long as the respondent understands the amendment and has an adequate opportunity to respond"). The Administrative Law Judge does not, however, reach the same conclusion with respect to Count XI, as discussed later in this Memorandum.